Walling v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17; 95 Cong. Rec. 11893, 12365, 14938, A2396, A5233, A5476. Such a contract affords to the employee the security of a regular weekly income and benefits the employer by enabling him to anticipate and control in advance at least some part of his labor costs. A guaranteed wage plan also provides a means of limiting overtime computation costs so that wide leeway is provided for working employees overtime without increasing the cost to the employer, which he would otherwise incur under the Act for working employees in excess of the statutory maximum hours standard. Recognizing both the inherent advantages and disadvantages of guaranteed wage plans, when viewed in this light, Congress sought to strike a balance between them which would, on the one hand, provide a feasible method of guaranteeing pay to employees who needed this protection without, on the other hand, nullifying the overtime requirements of the Act. The provisions of section 7(f) set forth the conditions under which, in the view of Congress, this may be done. Plans which do not meet these conditions were not thought to provide sufficient advantage to the employee to justify Congress in relieving employers of the overtime liability section 7(a).

§ 778.405 What types of employees are affected.

The type of employment agreement permitted under section 7(f) can be made only with (or by his representatives on behalf of) an employee whose ''duties * * * necessitate irregular hours of work.'' It is clear that no contract made with an employee who works a regularly scheduled workweek or whose schedule involves alternating fixed workweeks will qualify under this subsection. Even if an employee does in fact work a variable workweek, the question must still be asked whether his duties necessitate irregular hours of work. The subsection is not designed to apply in a situation where the hours of work vary from week to week at the discretion of the employer or the employee, nor to a situation where the employee works an irregular number of hours according to a predetermined schedule. The nature of the employee's duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week. Furthermore, for the reasons set forth in § 778.406, his duties must necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours. Some examples of the types of employees whose duties may necessitate irregular hours of work would be outside buyers, on-call servicemen, insurance adjusters, newspaper reporters and photographers, propmen, script girls and others engaged in similar work in the motion picture industry, firefighters, troubleshooters and the like. There are some employees in these groups whose hours of work are conditioned by factors beyond the control of their employer or themselves. However, the mere fact that an employee is engaged in one of the jobs just listed, for example, does not mean that his duties necessitate irregular hours. It is always a question of fact whether the particular employee's duties do or do not necessitate irregular hours. Many employees not listed here may qualify. Although office employees would not ordinarily qualify, some office employees whose duties compel them to work variable hours could also be in this category. For example, the confidential secretary of a top executive whose hours of work are irregular and unpredictable might also be compelled by the nature of her duties to work variable and unpredictable hours. This would not ordinarily be true of a stenographer or file clerk, nor would an employee who only rarely or in emergencies is called upon to work outside a regular schedule qualify for this exemption.

§ 778.406 Nonovertime hours as well as overtime hours must be irregular if section 7(f) is to apply.

Any employment in which the employee's hours fluctuate only in the overtime range above the maximum workweek prescribed by the statute lacks the irregularity of hours for which the Supreme Court found the so-called ''Belo'' contracts appropriate and so fails to meet the requirements of section 7(f) which were designed to validate, subject to express statutory limitations, contracts of a like kind in situations of the type considered by the Court (see § 778.404). Nothing in the legislative history of section 7(f) suggests any intent to suspend the normal application of the general overtime provisions of section 7(a) in situations where the weekly hours of an employee fluctuate only when overtime work in excess of the prescribed maximum weekly hours is performed. Section 7(a) was specifically designed to deal with such a situation by making such regular resort to overtime more costly to the employer and thus providing an inducement to spread the work rather than to impose additional overtime work on employees regularly employed for a workweek of the maximum statutory length. The ''security of a regular weekly income'' which the Supreme Court viewed as an important feature of the ''Belo'' wage plan militating against a holding that the contracts were invalid under the Act is, of course, already provided to employees who regularly work at least the maximum number of hours permitted without overtime pay under section 7(a). Their situation is not comparable in this respect to employees whose duties cause their weekly hours to fluctuate in such a way that some workweeks are short and others long and they cannot, without some guarantee, know in advance whether in a particular workweek they will be entitled to pay for the regular number of hours of nonovertime work contemplated by section 7(a). It is such employees whose duties necessitate ''irregular hours'' within the meaning of section 7(f) and whose ''security of a regular weekly income'' can be assured by a guarantee under that section which will serve to increase their hourly earnings in short workweeks under the statutory maximum hours. It is this benefit to the employee that the Supreme Court viewed, in effect, as a quid pro quo which could serve to balance a relaxation of the statutory requirement, applicable in other cases, that any overtime work should cost the employer 50 percent more per hour. In the enactment of section 7(f), as in the enactment of section 7(b) (1) and (2), the benefits that might inure to employees from a balancing of long workweeks against short workweeks under prescribed safeguards would seem to be the reason most likely to have influenced the legislators to provide express exemptions from the strict application of section 7(a). Consequently, where the fluctuations in an employee's hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not ''irregular'' within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption. (See *Goldberg* v. *Winn-Dixie Stores* (S.D. Fla.), 15 WH Cases 641; *Wirtz* v. *Midland Finance Co.* (N.D. Ga.), 16 WH Cases 141; *Trager* v. *J. E. Plastics Mfg. Co.* (S.D.N.Y.), 13 WH Cases 621; *McComb* v. *Utica Knitting Co.*, 164 F. 2d 670; *Foremost Dairies* v. *Wirtz*, 381 F. 2d 653 (C.A. 5).)

§ 778.407 The nature of the section 7(f) contract.

Payment must be made ''pursuant to a bona fide individual contract or pursuant to an agreement made as a result of collective bargaining by representatives of employees.'' It cannot be a one-sided affair determinable only by examination of the employer's books. The employee must not only be aware of but must have agreed to the method of compensation in advance of performing the work. Collective bargaining agreements in general are formal agreements which have been reduced to writing, but an individual employment contract may be either oral or written. While there is no requirement in section 7(f) that the agreement or contract be in writing, it is certainly desirable to reduce the agreement to writing, since a contract of this character is rather complicated and proof both of its existence and of its compliance with the various requirements of the section may be difficult if it is not in written form. Furthermore, the contract must be ''bona fide.'' This implies that both the making of the contract and the settlement of its terms were done in good faith.